Award No. 14379
Docket No. TE-13885

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Benjamin H. Wolf, Referee

PARTIES TO DISPUTE:

TRANSPORTATION-COMMUNICATION EMPLOYEES UNION
(Formerly The Order of Railroad Telegraphers)

FLORIDA EAST COAST RAILWAY COMPANY

STATEMENT OF CLAIM: Claim of the General Committee of The Order of Railroad Telegraphers on the Florida East Coast Railway, that:

1. Carrier violated and continues to violate the Agreement between the parties when, beginning July 22, 1961, it declared the position of second shift Operator at New Smyrna Beach, Florida, blanked on Saturdays and Sundays, and transferred the work of said position to Dispatchers.

2. Carrier shall compensate the senior idle extra operator in the amount of a day's pay for each day the position of second shift Operator at New Smyrna Beach has been, or in the future will be, blanked. In the event that on any such day, an extra operator is not available, Carrier shall compensate the occupant of said position in the amount of a day's pay.

EMPLOYES' STATEMENT OF FACTS: The Agreement between the parties, effective August 1, 1948, as supplemented and amended, is available to your Board and by this reference is made a part hereof.

For a period of twenty years or more prior to July 22, 1961, Carrier maintained continuous telegraph service at A Office at New Smyrna Beach, Florida. A Office is located in a room adjoining the dispatchers' office at New Smyrna Beach. The duties of the operators at A Office include the handling of train orders and the handling of messages and/or communications or reports of record to and from virtually every station on the railroad. The volume of work at A Office is very heavy.

The Wage Scale lists a total of five operator positions at New Smyrna Beach A Office. However, a few years ago, Carrier abolished two of the positions, leaving round-the-clock service with one employe working on each shift, the assigned hours of each position, seven days per week, as follows:

"RULE 2.

CLASSIFICATION OF EMPLOYES AND NEW POSITIONS

(a) Where existing payroll classification does not conform to Rule 1, employes performing service in the classes specified therein shall be classified in accordance therewith.

(b) Rates of pay for new positions shall be in conformity with the rates of pay for positions of similar work and responsibility in the seniority district where created.

(c) Positions shall be rated, and the transfer of rates from one position to another shall not be allowed.

(d) The entering of employes in the positions covered by this agreement or changing their classification or work shall not operate to establish a less favorable rate of pay or condition of employment than is herein provided."

"RULE 8.

NOTIFIED OR CALLED

(a) Employes notified or called to perform work not continuous with the regular work period will be allowed a minimum of two (2) hours at time and one-half rate for two (2) hours' work or less, and if held on duty in excess of two (2) hours, time and one-half will be allowed on the minute basis. Each call to duty after being released shall be a separate call."

"RULE 26.

HANDLING TRAIN ORDERS

No employe other than covered by this schedule and train dispatchers will be permitted to handle train orders at telegraph or telephone offices where an operator is employed and is available or can be promptly located, except in an emergency, in which case the telegrapher will be paid for the call."

OPINION OF BOARD: The claim is that Carrier violated its agreement with the telegraphers in blanking the rest days of a seven day position and assigning train dispatchers to do whatever work remained.

The facts are not in dispute. Carrier had maintained continuous telegraph service at A Office at New Smyrna Beach with one employe working on each of 3 shifts and relief assignments on the regular employe's days off.

On July 17, 1961, Carrier announced:

"Position No. 9 New Smyrna Beach 3:45 P.M. to 11:45 P.M. will be blanked on Saturdays and Sundays beginning Saturday, July 22nd."

Thereafter, Carrier required the dispatchers to perform the work remaining on the blanked days.

Carrier defended its action on the grounds that the work of Position No. 9 had diminished to the point where a telegrapher was not needed on Saturdays and Sundays, the rest days of the position.

The Organization argued that Carrier had violated the Scope Rule and Rule 7 (e) which read:

"RULE 1. SCOPE

This Agreement will govern the employment and compensation of Telegraphers, Telephone Operators (except Switchboard Operators), Agent-Telegraphers, Agent-Telephoners, Tower Men, Lever Men, Tower and Train Directors, Block Operators, Clerk-Operators, Staff Men and such Agents as are shown in the wage scale, and will supersede all previous agreements and rulings thereon."

"RULE 7.

(e) Where work is required to be performed on a day which is not a part of any assignment, it may be performed by an available extra employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

Essentially, the Carrier argued that before Rule 7 (e) can be invoked, the Organization must prove that it is entitled to the work by reason of the Scope Rule, which, in this case, is general and gives no exclusive right to the Organization unless it shows that it had that right by history, custom and tradition. This the Organization had failed to do. Contrariwise, the Carrier alleged that train dispatchers had customarily performed the duties reassigned to them and that the agreement expressly authorized train dispatchers to handle train orders. (Rule 26.)

Whether the Scope Rule applies here depends on whether Rule 7 (e) does. If Rule 7 (e) applies, it takes precedence, because it is a specific rule, whereas the Scope Rule is general.

The Organization makes no claim that this work belongs exclusively to the telegraphers. It asserts merely that Rule 7 (e) requires that work of a position on an unassigned day must be assigned in the order contracted by the parties.

This is a sound argument. Not every right under the agreement needs the prior support of the Scope Rule. A senior employe does not have to prove an exclusive right to the work to prevail against a junior employe. We have held that when Carrier places certain work under the agreement it must do so according to the rules of the agreement. See Awards Nos. 13177 and 13833.

The Organization cannot assert that it is entitled to this work under the Scope Rule. Although it makes such an assertion, we reject it under the well established rule that it must prove its right thereto by history, custom and tradition. The Organization has the right, however, to say that if the

Carrier places the work under its agreement, it is obliged to assign it in accordance with Rule 7 (e). Under this theory the Organization need make no claim to exclusivity. It does not object to Carrier's right to abolish the job and transfer the remaining work to dispatchers. It does object to the transfer of work which is part of a telegrapher's job to a train dispatcher.

In support of its position, the Organization cites 3 pertinent awards, 5810 (Carter), 6689 (Leiserson) and 11604 (Coburn). In Award 5810, on this very property, we held that Carrier could not reduce a seven day position to six by allowing the work remaining to be performed on the seventh day to be done by an employe at another station. Rest day work, it held, must be given to an extra man, if available, and if not to the occupant of the regular position.

This award does not wholly answer the question because it makes Rule 7 (e) applicable as between members of the bargaining unit. The Organization argues that if it applies between members of the bargaining unit, it applies, a fortiori, between a member of the unit and one outside. This does not necessarily follow, for the agreement may apply only as to the order of assignment among those under the agreement and not to those outside.

In Award 6689, the question is considered in depth, and is impressive not only for its content, but because the referee was also one of those who drafted the work on unassigned days rule and must have known the intention motivating it. It held that Carrier

> "undoubtedly has the right to assign ticket selling duties to the agent and telegraphic work in connection with the movement of trains to train dispatchers, as well as to have these duties performed by the telegraphers. But, the assigning of this work to which no one craft has an exclusive right is a matter of contract between the Carrier and two or more labor organizations. And when, as in this case, it has contracted with the telegraphers to have the duties they perform in accordance with their bulletined assignments as they performed them before the 5-day week was put into effect, the Carrier may not disregard the obligations of this contract. . . ."

Award 11604 held that Carrier could not use train dispatchers to do the work of an absent relief telegrapher on the same theory.

The basis of these cases seems to be that the work remained part of the bulletined job and as long as it remained such it had to be assigned according to the unassigned work rule.

Carrier cites Award 10237 (Carey) which held that Award 6689 dealt with and applied to a situation in which there was "plenty of work necessary to be done on the rest days of the assigned telegraphers." It then proceeded to hold that where the evidence was that the change was the result of a substantial reduction in business, Award 6689 did not apply. As we read Award 6689, the amount of work remaining was not influential in the decision. Rather, it rested on the theory that the remaining work was still part of the telegraphers' job.

The Carrier also relied on Award 13197 (Zack). That award, however, did not consider the impact of the unassigned work rule.

The central question is, therefore, were the duties remaining on the rest days still a part of Position No. 9? We think they were. Carrier did not abolish Position No. 9 and distribute its duties. If it had, the Organization admits it would have no claim. Carrier merely blanked the position, i.e., did not assign any one to fill it. The duties of the position were not changed. They remained, as before, duties of the position.

By blanking the position, Carrier did not remove the duties and redistribute them. It stated that it was assigning no one to the position and then proceeded to assign the dispatcher.

So long as these duties remained duties of Position No. 9, Carrier was obliged to assign the work as required by Rule 7 (e).

Award 10237, indeed, holds a different view. Without disputing the validity of Award 6689, it holds that if Carrier is motivated by a diminution of the job, it may assign train dispatchers to do the work. In our case, although Carrier alleges that the work diminished it offered no evidence in support thereof. It was mere assertion — not proof. The Organization, on the other hand, submitted evidence that on some of the days, the dispatcher performed numerous duties spaced throughout almost the entire shift. On the facts, if not otherwise, Award 10237 is not relevant.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 5th day of May 1966.

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